STATE OF MICHIGAN

COURT OF APPEALS

PAMELA R. HIXENBAUGH,

Plaintiff-Appellant,

v

GENE LUKONEN,

Defendant-Appellee.

UNPUBLISHED
March 1, 2005

No. 251042
Genesee Circuit Court
LC No. 96-045117-NI

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right a jury verdict in favor of defendant. Plaintiff filed suit seeking to recover for injuries that she alleged were sustained as a result of defendant's negligence in causing an automobile accident in 1995. Following a verdict for defendant, plaintiff moved for a new trial, which the trial court granted. This appeal is from the verdict in the second trial. We affirm in part and reverse in part and remand.

Testimony at the second trial indicated that plaintiff suffered from a congenital narrowing of the spine and that she had suffered neck and back injuries in an unrelated 1988 automobile accident. Plaintiff asserted that the 1995 accident resulted in a new injury or aggravated the preexisting condition of her neck; defendant argued that the injury of which plaintiff complained was solely the result of her congenital condition and the injuries suffered in 1988. Plaintiff presented the testimony of two of her treating physicians; defendant presented the testimony of two doctors who evaluated plaintiff in connection with the lawsuit and/or her worker's compensation claim arising from the accident. The jury returned a verdict in favor of defendant, finding that, while defendant was negligent, defendant's negligence was not the proximate cause of the injuries claimed by plaintiff.

On appeal, plaintiff first argues that the trial court abused its discretion in denying her motion in limine to exclude evidence that she received a $20,000 uninsured motorist arbitration award following the 1988 accident, because the existence and amount of this award was not relevant to whether plaintiff was injured as a result of defendant having negligently caused the 1995 accident. We agree. However, because we find that plaintiff was not prejudiced by this error, reversal is not required.

In denying plaintiff's motion in limine, the trial court concluded that the amount and existence of the arbitration award from plaintiff's 1988 accident was relevant to the instant action

because, in the event the jury was asked to apportion damages as between injuries caused by each of the two accidents, the jury needed to know "about what happened in the previous years."

A trial court's decision whether to admit evidence is within its sound discretion and will not be reversed on appeal absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). Error may not be predicated upon the admission of evidence unless that admission affected a substantial right of a party such that the error is not harmless. MRE 103(a); *Campbell v Sullins*, 257 Mich App 179, 196-197; 667 NW2d 887 (2003). Reversal is not warranted unless it affirmatively appears that the failure to grant relief is inconsistent with substantial justice. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Generally speaking, only relevant evidence is admissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the case more or less probable than it would be without the evidence. MRE 401.

One of the issues before the jury in this case was whether plaintiff's injuries were proximately caused by defendant's negligence. Certainly, the fact that plaintiff was injured in the 1988 accident, as well as the nature and extent of that injury, was relevant to determining whether plaintiff's condition was proximately caused by defendant's negligence in the 1995 accident. Plaintiff does not contend otherwise. However, especially given that the amount of the compensation she received was not based on the nature and extent of that injury, the fact that she brought a claim, which was settled for the policy limit of $20,000, does not tend to make the existence of any consequential fact more or less probable than it would be without that evidence. Without the evidence, the jury would still have been able to award damages predicated on an allocation of injuries arising out of the two accidents, if indeed such an allocation could be made. If the jury could not separate or allocate the injuries or damages, it was instructed to award plaintiff the entire amount of her damages, again making the arbitration award irrelevant. Therefore, there was no basis for the trial court's ruling that such evidence was relevant. Nevertheless, given the amount of evidence presented at trial as to the nature and extent of plaintiff's 1988 injuries, her congenital stenosis, the impact of the 1995 accident on the condition of her neck, the jury's focus on causation, and the limited reference to the existence and amount of the award, we cannot conclude that the error was prejudicial, or that the verdict was inconsistent with substantial justice. Therefore, reversal is not warranted.

Plaintiff next argues that the trial court abused its discretion in admitting the medical examination reports of Dr. Colah and Dr. Harvey, which were prepared in anticipation of litigation and were not regular medical records. We agree. However, because the content of the reports was cumulative to the respective doctor's testimony at trial, plaintiff was not prejudiced by their admission. MCR 2.613(A).

Plaintiff next argues that the trial court erred in denying her motion for new trial or JNOV, where the medical experts all agreed that plaintiff suffered an injury in the 1995 collision. Plaintiff contends that the jury's determination that her injury was not proximately caused by defendant's negligence was against the great weight of the evidence. In denying plaintiff's motions, the trial court concluded that Drs. Colah and/or Harvey provided testimony that supported the jury's finding of no proximate cause.

The trial court should grant a motion for JNOV only if the evidence fails to establish a claim as a matter of law. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). Thus, this

Court reviews the trial court's denial of a motion for JNOV to determine whether reasonable jurors could have reached different conclusions when viewing the testimony and all legitimate inferences arising therefrom in a light most favorable to the nonmoving party. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). If reasonable jurors could have reached different conclusions, the jury verdict must stand. *Id*.

This Court reviews a trial court's ruling on a motion for new trial for an abuse of discretion. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 682; 630 NW2d 356 (2001). In deciding whether to grant or deny a motion for a new trial, where that motion was brought on the ground that the verdict was against the great weight of the evidence, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. *Campbell, supra* at 193. This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.*

On appeal, plaintiff asserts that all the doctors acknowledged some injury resulting from the accident. The record indicates that plaintiff oversimplifies the testimony of the experts. Dr. Colah noted that his neurological exam of plaintiff produced inconsistent findings, that other neurological exams produced normal or insignificant results, that plaintiff did not mention having any pre-1995 neck problems to him during the exam, and that plaintiff's symptoms were caused by degenerative changes and her own emotional functional overlay. Dr. Harvey testified that in his opinion there was no evidence of anything diagnosable resulting from the accident that was causing plaintiff's ongoing neck pain. Dr. Harvey indicated that plaintiff's neck pain was caused by significant degenerative changes that developed and progressed beginning in the late 1980s. Plaintiff's doctors testified that the pain she suffered after the accident resulted from an injury inflicted during the accident; defendant's doctors testified that the "injury" claimed by plaintiff was not a result of the 1995 accident, but rather was caused by plaintiff's congenital stenosis and degenerative changes, possibly impacted or accelerated by the injury she suffered during the 1988 accident. Overall, then, there was conflicting evidence as to whether the injury claimed by plaintiff was proximately caused by the 1995 accident. Thus, the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. This case involved conflicting medical testimony, with issues of credibility regarding the nature and cause of plaintiff's neck ailment, the evaluation of which was properly left to the jury. Therefore, giving all proper deference to the trial court, we cannot say that the trial court erred in denying plaintiff's motion for JNOV, or abused its discretion in denying plaintiff's motion for a new trial.

Plaintiff next argues that she was entitled to a new trial as a result of comments made by defense counsel during closing argument. We disagree.

During his closing argument, plaintiff's counsel challenged the credibility of the doctors presented by the defense, essentially asserting that these doctors were hired guns that were going to tell the jury what defense counsel wanted the jury to hear. Defense counsel responded that for plaintiff's counsel to make such a suggestion without any evidence that these witnesses were

lying made him angry and he hoped it made the jurors angry. Plaintiff objected; the objection was sustained and defense counsel withdrew the comment.

Following the verdict, plaintiff moved for a new trial asserting in part that these comments appealed to the passion of the jury to decide the case based on emotion and not on the evidence. The trial court disagreed, noting that these comments were isolated and were not strong enough to inflame the jury. This Court reviews the trial court's denial of the plaintiff's motion for a new trial for an abuse of discretion. *Hilgendorf, supra* at 682. When reviewing an assertion of improper comments by an attorney, this Court first determines whether the attorney's comments were error and, if so, whether that error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). This Court has held that an attorney's comments usually are not cause for reversal unless they "indicate a deliberate course of conduct aimed at preventing a fair and impartial trial[,]" or were "such that they deflected the jury's attention from the issues involved." *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 9; 535 NW2d 215 (1995). We conclude that defense counsel's remarks, which were responsive to the comments of plaintiff's counsel, do not reflect such a purpose. Further, the trial court instructed the jurors that they were to decide the case based on the evidence presented, that the evidence consisted of the witnesses' testimony and the exhibits, that any sympathies or prejudices they may have could not be a part of their deliberations, and that the statements, arguments, and remarks of counsel were not evidence. Counsel's comments generally do not require reversal where the jury was so instructed. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001).

Plaintiff next argues that the trial court erred in not directing a verdict for plaintiff as to any assertion of comparative negligence on her part. However, assuming error, it did not affect the outcome of the trial, as the jury never reached this issue. Accordingly, there is no need for us to review or analyze the issue.

Finally, plaintiff argues that the trial court abused its discretion in awarding defendant costs and fees incurred in both trials. We agree.

Defendant made an offer of judgment of $75,000 before the first trial; plaintiff rejected that offer by way of a counteroffer of judgment of $100,000. With the verdict having been rendered in his favor, defendant moved for the imposition of costs against plaintiff covering the entirety of the case. The trial court granted that motion, ruling that because plaintiff had moved for a new trial after the first trial and had received "two bites at the apple," she should be assessed costs for both trials. This Court reviews a trial court's decision regarding the application of the "interest of justice" exception to MCR 2.405 for an abuse of discretion. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 472, 476-477; 624 NW2d 427 (2000).

MCR 2.405(D)(1) provides that if the adjusted verdict is more favorable to the offeror than the average offer of judgment, then the offeree must pay to the offeror the offeror's actual costs incurred in defending the action. Under the offer of judgment rule, actual costs are taxable costs and fees plus reasonable attorney fees for services necessitated by the failure to accept the offer of judgment. MCR 2.405(A)(6); *Luidens v 63rd Dist Court*, 219 Mich App 24, 30; 555 NW2d 709 (1996). The purpose of this rule is to avoid protracted litigation and encourage settlement. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 640; 567 NW2d 468

(1997)(citation omitted). MCR 2.405(D)(3) provides that a court may refuse, in the interest of justice, to award attorney fees as part of the award of costs under the rule. See *Wilkins v Gagliardi*, 219 Mich App 260, 274; 556 NW2d 171 (1996).

Plaintiff argues on appeal that, in the interest of justice, the trial court should have limited defendant's recovery to the costs for only one of the two trials and that failure to do so was an abuse of discretion. We have found no cases addressing whether offer of judgment sanctions may include attorney fees from more than one trial in the same case. However, in *Severn v Sperry Corp*, 212 Mich App 406, 417; 538 NW2d 50 (1995), this Court held that where the plaintiffs were entitled to sanctions under MCR 2.403 based on the defendant's rejection of mediation, and where a second trial was held following the defendant's motion for new trial, the plaintiffs could recover attorney fees in connection with both trials. This Court explained that "[c]learly, fees generated in connection with both trials were 'necessitated by the rejection' of the mediation evaluation because they arose after the rejection. . . . [This] interpretation of the court rule is harmonious with its purpose, which is to impose the burden of litigation costs upon the rejecting party. The cost of two trials was part of the risk assumed by defendant when it rejected the mediation evaluation." *Id.* (citation omitted). Given the similarity of purpose and language of MCR 2.403 and MCR 2.405,[1] we conclude that the rule set forth in *Severn* is equally applicable to MCR 2.405. However, here the "interest of justice" exception found in MCR 2.405(D)(3) clearly should have been invoked. The first trial resulted in the jury's finding that defendant was not negligent, although the overwhelming evidence indicated that he was indeed negligent in pulling out in front of plaintiff's vehicle. The jury had been instructed, at defendant's request and insistence, on the defense of sudden emergency. This defense was not supported in any manner through the testimony presented at trial, and the trial court, recognizing that it had grievously erred, granted plaintiff's motion for new trial. Through no fault of plaintiff, a second trial became necessary, resulting in a verdict that found defendant negligent but with a lack of proximate cause relative to plaintiff's injuries. Even in the second trial, there were multiple errors committed by the trial court, as reflected in this opinion, that were unfavorable to plaintiff. Defendant did not renew an offer of judgment before the second trial. We conclude that the trial court abused its discretion in not applying the "interest of justice" exception under the circumstances presented in this case.[2] Accordingly, the case is remanded to the trial court for a new calculation of actual costs consistent with this opinion.

Affirmed in part and reversed in part and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell

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[1] MCR 2.405(A)(6) speaks of costs "for services necessitated by the failure to stipulate to the entry of judgment," and MCR 2.403(O)(6)(b) alludes to the payment of attorney fees "for services necessitated by the rejection of the case evaluation."

[2] Judge O'Connell concludes that the trial court did not abuse its discretion and would affirm the trial court's decision in its entirety.